UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J & J SNACK FOODS HANDHELDS CORP.

And

Case 19-CA-126632, 127401, 127413, 127689, 134279

TEAMSTERS NO. 839

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

I. INTRODUCTION

This brief supports the exceptions of J&J Snack Food Handheld Corp. (J&J) to the decision of the Administrative Law Judge Eleanor Laws, filed, March 13, 2015, finding that J&J violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act"). As explained in more detail below, the ALJ's decision erred as follows:

- J&J did not violate Section 8(a)(1) and 8(a)(5) of the Act by banning Teamsters Local 839 ("Union" or "Local 839") Representative Richard Davies from J&J's Weston, Oregon facility ("Facility"), failing to recognize Mr. Davies as the Union's representative and telling J&J employees that Mr. Davies was not allowed on the premises because J&J presented persuasive evidence that the presence of Mr. Davies, particularly because of his harassing, discriminatory, and unprofessional behavior, created ill will that made good faith bargaining impossible; See Exception 1-2.

- J&J did not violate Section 8(a)(1) and 8(a)(5) of the Act by ceasing its practice of providing cooked quality assurance ("QA") food samples in the cafeteria without bargaining because 1) no duty to bargain arose as the decision to suspend the provision of Q&A samples did not constitute a material, substantial and significant change; 2) no enforceable unbroken past practice existed; and 3) the change was necessitated by law; See Exception 3-4.

- J&J did not violate Section 8(a)(1) and 8(a)(5) of the Act by unilaterally altering plant visitation and access rules to conform the rules to the parties

collective bargaining agreement ("CBA") because the change was not material, substantial or significant. See Exception 5-6.

Accordingly, the ALJ's decision should be reversed and the National Labor Relations Board ("Board") should issue an order finding that J&J did not violate Sections 8(a)(1) and 8(a)(5) of the Act with regard to the aforementioned conduct.

II. STATEMENT OF CASE

A. The Weston Plant

As part of its nationwide snack food manufacturing and distribution operation, J&J operates a plant in Weston, Oregon ("Weston Facility"). The Weston Facility employs roughly 165 individuals. (Tr. at 367:14).[1] The plant manufactures multiple different products including: pretzels, pretzel dogs, Nutrisystem product, ALDI Fit and Act product and a "pork, sauce and cheese product enrobed in dough and flash fried" that is termed a "line two handheld." Each product is made on a different line in the factory. (Tr. at 367:20-25, 368:1-6). The Nutrisystem, ALDI Fit and Active and line two handheld products are made on line two and are USDA products. (Tr. at 368:10-20). The USDA periodically inspects the Weston Facility to make sure that line two is clean, the ingredients are up to date and all rules and regulations are being satisfied. Id. Of the USDA products, only the line two handheld is tested by the Quality Assurance lab. (Tr. at 400:18-20).

The non-supervisory employees of the plant are represented by Teamsters Local 839 ("Local 839" or "Union"). Roughly 155 of the Weston facilities 165 employees are represented by Local 839. (Tr. at 367:15-17). The President of Local 839 is Robert Hawks. The union

[1] Record citations are to the hearing transcript by "Tr." with page and line numbers, and to General Counsel Exhibits, Respondent Exhibits or Joint Exhibits by "GC Ex.", "Respondent Ex.," or "Joint Ex.", respectfully, with exhibit numbers. Citations to the Administrative Law Judge's decision are by "ALJ Decision" with page and line numbers.

business representative at the Weston Facility is Rich Davies. J&J and Local 839 have had a relationship since J&J purchased the Weston Facility in 2011 and recognized the Union as having majority status at the Weston Facility. The parties have successfully negotiated two collective bargaining agreements. The current collective bargaining agreement is in effect until 2017.

B. Rich Davies Poisons the Relationship Between Local 839 and J&J

In late 2013 and early 2014, J&J hired a new plant manager, Adam Ligon and a new human resources manager, Karen Schofield. Shortly after both Mr. Ligon and Ms. Schofield began working, Mr. Davies began to act in an unprofessional, uncooperative and harassing manner.

Mr. Davies first engaged in unprofessional and dishonest conduct on March 13, 2014, at a step three grievance meeting regarding the termination of three employees for allegedly stealing frozen product. This meeting was attended by Mr. John Humble, Quality Assurance Manager, Ms. Schofield, Ms. Sandy McCullough, Human Resources Administrator, Mr. Davies and Mr. Hawks. (Tr. at 367:6-8). At that meeting, Mr. Davies argued that the discipline should be rescinded because the employees had acted in concert with plant practice by taking frozen food out of the plant. (Tr. at 100:15-17). During this meeting, Mr. Davies stated that he knew for a fact that employees as well as supervisors were taking product out of the Weston Facility and reselling the product. (Tr. at 373:4-12). Mr. Ligon asked Mr. Davies to identify these individuals and he refused to, stating that "these are my friends ... and I do not want to throw anybody under the bus." (Tr. at 372:2-18). After the meeting concluded, Mr. Davies denied ever stating that he had knowledge of individuals taking product from the plant and reselling it and accused Mr. Ligon and Ms. Schofield of lying or twisting his words. (Tr. at 124:15-25). At

the hearing, every J&J witness present at the March 13 meeting, including Mr. Ligon, Mr. Humble and Ms. McCullough all testified that Mr. Davies stated he knew employees were taking product from the plant and reselling it. (Tr. at 313:9-24; 373:4-18, 472:4-10).

Mr. Davies false accusation that Mr. Ligon and Ms. Schofield mischaracterized what he said at the March 13 meeting, coupled with his disingenuous denial of having any knowledge of employees reselling product, did substantial harm to the bargaining relationship. Instead of working to improve the situation, Mr. Davies's unprofessional conduct worsened. After the March 13, 2014 meeting, Mr. Davies testified that he had a "beef" with Ms. Schofield and started treating her in a hostile and harassing manner. (Tr. at 118:7). When Ms. Schofield suggested that employees would need to consent before she provided their contact information to the Union, Mr. Davies insulted her competence by mockingly asking her "who is your attorney" and threatened litigation. (Joint Exhibit 6; Respondent Exhibit 10 ("Anytime I don't get it ... we will file a charge with the Board")).

Mr. Davies harassing, hostile and unprofessional conduct toward Ms. Schofield culminated at an April 10, 2014 grievance meeting. The meeting involved the discipline of a Spanish speaking employee whose grievance was written in Spanish. After Ms. Schofield began the meeting and stated her position, Mr. Davies harassed her. According to Ms. McCullough, an eye-witness to Mr. Davies's rant, he stood up, began to flail his arms, and acted in a threatening manner. He questioned her competency to perform her job. He also said that she was "ugly," "mean" and unprofessional. Mr. Davies tirade lasted several minutes. (Tr. 316:14-25, 317:1-15). Mr. Davies conduct at this meeting was so outrageous that J&J's counsel sent Mr. Davies a letter informing him that such behavior would not be tolerated and, if it continued, could result in his removal from the Weston Facility. (Joint Exhibit 5).

Several days later, on April 22, 2014, Mr. Davies engaged in hostile and unprofessional behavior towards Mr. Ligon. That day, Mr. Ligon sent Mr. Davies an email informing him of some changes to the plant access rules to harmonize, in Mr. Ligon's view, the rules with the Parties' CBA. (Tr. at 388:11-22). Specifically, the changes included the following: 1) 24 hour notice of a planned plant visit; 2) notification of the Plant Manager or HR Manger when a Union representative arrived at the facility and 3) that the Union representative limit visits to the cafeteria.[2] When Mr. Davies saw Mr. Ligon in the cafeteria, he shouted at him in a loud voice that he received the email and that he disagreed with the change. (Tr. at 388:23-389). Mr. Davies than began to follow Mr. Ligon and, in an escalating tone, challenged Mr. Ligon's ability to enforce the new plant access rules and threatened litigation. Id. Ultimately, Mr. Davies became so irate that he called Mr. Ligon an "ass" and stormed out of the Weston Facility. (Tr. at 390:1).

On April 23, 2014, Mr. Davies was banned from the Weston Facility because of his hostile, harassing and unprofessional conduct. On April 24, 2014, a letter was distributed to all employees informing them of Mr. Davies' ban.

C. Suspension of QA Samples

The Quality Assurance lab at the Weston Facility conducts bi-weekly tests on the line two handheld products to ensure they meet J&J standards. Some of the tested product would then be placed in the cafeteria for employees to consume. The remainder would be shipped to a hog farm. No other product was ever tested or allowed to be consumed by employees. (Tr. at

[2] J&J specifically denies that it has ever required the Union representative to only visit during administrative hours. The General Counsel did not proffer any evidence regarding the allegation that the employer requested that the Union not use the cafeteria as "Union hall" or that the employer requested that the Union limit the duration of their visits to "a respectable amount of time." As there was no evidence to support these allegations, the ALJ should not have made reference to or included them in her conclusions of law. ALJ Decisions, pg. 29:16-18.

280:16-18; 400:18-20). In early 2012, the practice of allowing employees to consume QA samples was unilaterally discontinued by the plant manager at the time, Rob Tiberino, because of reports that employees were removing the samples from the refrigerator in the QA lab. (Tr. at 449:13-25; 450:1-7). A few months later, the practice was unilaterally restarted. (Tr. at 454:8-10).[3]

The practice of allowing QA samples to be consumed was again suspended in March, 2014, after Mr. Davies stated he knew that employees were taking product from the Weston Facility and reselling it. (Tr. at 373:8-12). After Mr. Davies told J&J that he knew employees were taking food from the plant and reselling it at the March 13 meeting, Mr. Humble contacted the specific USDA inspector assigned to the Weston Facility, Steven Hilberg, to determine whether reselling product outside of the plant by employees could result in the Weston Facility losing its USDA license. (Tr. at 374:16-23; 451:18-453:23). The USDA confirmed that since this could be a second infraction (ConAgra had received such an infraction when it owned the Weston Facility) if non-salable product was being resold outside the facility, the Weston Facility could lose its USDA license. (Tr. at 375:8-11). Mr. Ligon, after consultation with Mr. Humble, determined it was too great a risk and decided to discontinue the practice of providing QA samples for consumption. (Tr. at 375:14-16).

III. QUESTIONS PRESENTED

The questions presented and addressed below are the following:

A. Did the ALJ err in determining that J&J violated Section 8(a)(1) and 8(a)(5) of the Act by banning Union Representative Richard Davies from the Weston Facility, failing to recognize Mr. Davies as the Union's representative and telling J&J employees that Mr. Davies was not allowed on the premises?

[3] In addition, the practice of removing samples from the facility was discontinued and never reinstated. Despite this permanent change to the sample policy, the Union never grieved or filed an Unfair Labor Practice charge regarding the employer's unilateral decision. (Tr. at 131:20-22; 450:13-16).

Suggested Answer: Yes.

B. Did the ALJ err in determining that J&J violated Section 8(a)(1) and 8(a)(5) of the Act by ceasing its practice of providing cooked quality assurance ("Q&A") food samples in the cafeteria without bargaining?

Suggested Answer: Yes.

C. Did the ALJ err in determining that J&J violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally altering plant visitation and access rules to conform the rules to the parties collective bargaining agreement ("CBA")?

Suggested Answer: Yes.

IV. ARGUMENT

A. The ALJ Erred in Determining That J&J Was Not Justified in Banning Mr. Davies From the Weston Facility, Refusing to Recognize Him as The Union Representative and Telling J&J Employees Mr. Davies Was Banned From the Premises.

The ALJ erred in finding that J&J was not justified in its decision to ban and refuse to deal with Mr. Davies because: 1) the ALJ failed to apply Board precedent holding that an employer may lawfully refuse to meet with a union representative when that representative has engaged in conduct that is potentially unlawful harassment and 2) the ALJ failed to appropriately analyze and apply Board case law allowing an employer to ban a union representative whose presence created ill will that made good faith bargaining impossible.

First, the ALJ completely failed to address Board precedent, raised in J&J's post-hearing brief, which allows an employer to refuse to meet with a union representative when that representative has engaged in conduct that is potentially unlawful harassment. Specifically, the Division of Advice has concluded, and the Board has adopted, that an employer may lawfully refuse to meet with a union representative when that representative has engaged in conduct that is potentially unlawful harassment. Chas H. Lilly Co., 30 NLRB AMR 40055 (1996) (noting

"**unless Gipson's conduct constituted unlawful sexual harassment**, ... the employer was not relived of its duty to meet with him."). Rather than address and analyze this salient issue, the ALJ summarily rejected J&J's argument in a footnote stating "the Board lacks jurisdiction to determine the merits of a Title VII gender discrimination claim." ALJ Decision, pg. 18, fn. 24.

Contrary to the ALJ's inadequate analysis, ample credible evidence was proffered by J&J evidencing that Mr. Davies's conduct towards Ms. Schofield constituted potentially unlawful harassment. Mr. Davies's conduct, which was corroborated by multiple witnesses and found to have occurred by the ALJ, included: denigrating Ms. Schofield's competency and intelligence, calling Ms. Schofield stupid because she allegedly could not speak Spanish as well as he could, acting in a rude and disrespectful manner towards Ms. Schofield including accusing her of being "mean" and "ugly", making gender based remarks such as routinely calling Ms. Schofield "she" or "her" instead of her real name and starring at Ms. Schofield.[4] ALJ Decision, pg. 17:33:39; 18:1-21, 28-30; 19: 26-29.

In particular, Mr. Davies's description of Ms. Schofield as acting "ugly" is illustrative of his gender-based vitriol. Mr. Davies used the word ugly in describing Ms. Schofield to disparage her on the basis of her gender; the hallmark of gender-based harassment. In total, this conduct is sufficient to create a triable question as to whether Mr. Davies' conduct was unlawful harassment. See e.g. Powell v. Las Vegas Hilton Corp., 841F. Supp. 1024 (D. Nev. 1992) (finding that two incidents of gender based remarks and staring at plaintiff sufficient to create issue of fact as to whether customer engaged in harassment); Steiner v. Showboat Operating Co.,

[4] While the ALJ noted that the employer's witness, Ms. McCullough, appeared unsure about the dates when Mr. Davies would "giv[e] Ms. Schofield the cold shoulder and refer to Schofield as "she" and "her," she did not find that Ms. McCullough was lying or that the conduct did not occur. ALJ Decision, pg. 18:28-30. Rather, the ALJ specifically found that she was not "intentionally trying to be untruthful, but instead was ... nervous and confused." Id. at 18, fn. 25. Similarly, while it was unclear when Mr. Davies starred at Ms. Schofield, the ALJ did not expressly find that such conduct did not occur.

25 F.3d 1459 (9th Cir. 1994) (reversing grant of summary judgment on plaintiff's harassment claim and concluding that verbal tirade, derogatory comments and staring sufficient evidence to articulate prima facie case of harassment). Moreover, J&J was not asking the ALJ to determine whether Mr. Davies's conduct violated Title VII but whether his conduct was sufficiently serious enough to constitute potentially unlawful harassment, justifying J&J's refusal to deal with him and allow him access to the Facility.

Second, the ALJ failed to analyze appropriately and apply Board case law allowing an employer to ban a Union representative whose presence created ill will that made good faith bargaining impossible. It is well settled that each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party. Fitzsimmons Mfg. Co., 251 NLRB 375, 379 (1980). A party's right to select its representative, however, is not absolute, and the other party is relieved of its duty to deal with a particular representative when that representative's presence would render collective bargaining impossible or futile. Id. Accordingly, an employer is justified in refusing to deal with a union representative where the representative's conduct rises to a "clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." CBS, Inc., 226 NLRB 537, 539 (1976).

Instead of engaging in a careful analysis of the effect Mr. Davies conduct had on the Union's relationship with J&J, the ALJ blithely asserted "All told, the record does not contain persuasive evidence that Davies presence would create ill will and Mr. Davies' conduct made good faith bargaining impossible." ALJ Decision, pg. 20:5-6. At no point in the entire decision does the ALJ ever explain the basis for her assertion. Contrary to the ALJ's conclusory assertion, and based on the conduct that the ALJ found Mr. Davies to have engaged in, Mr.

Davies behavior was sufficiently severe as to justify his banishment from the Weston Facility. Specifically, Mr. Davies engaged in the following unprofessional and harassing conduct justifying his permanent removal from the Weston Facility: 1) harassed Ms. Schofield by denigrating her intelligence, calling her demeaning names such as "ugly and "mean," treating her in a rude and disrespectful manner and starring at her; 2) called Mr. Ligon an "ass"; and 3) called J&J's attorney, Alfred D'Angelo an "ass." ALJ Decision, pg. 17:33:39; 18:1-30; 19: 26-29, 32-33.[5]

This unprofessional, hostile and profane behavior was engaged in with the express purpose of poising the bargaining relationship between the Union and J&J. Mr. Davies testified that he called J&J's attorney, Alfred D'Angelo, an "ass" in order to give Karen "something to say to Harry [J&J's vice president]." (Tr. at 156:2-4). He admitted that he made the comment so that Harry would realize the depth of his antagonism for J&J. (Tr. at 156:2-13; see also Tr. at 118:7 ("my beef was with Karyn Schofield.")).

Simply put, this pattern of harassing, discriminatory and hostile conduct is inimical to the development of a positive bargaining relationship and constitutes the type of conduct that is a "clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." CBS, Inc., 226 NLRB 537, 539 (1976). It should be of no moment that Mr. Davies did not physically threaten or assault any J&J employee, as prior board

[5] The ALJ's conclusion that J&J cannot rely on Mr. Davies calling Mr. Ligon an "ass" because it was in response to Mr. Ligon's unilateral change to Union access rules is incorrect. The ALJ supports her specious proposition by relying on Long Island Jewish Medical Center, 296 NLRB 51, 72 (1989). This reliance is misplaced as in Long Island Jewish Medical Center the Board determined that an employer could not rely on a manager's indiscretion, i.e. pushing an employee and union organizer, to justify termination of an employee when he was provoked by an agent of the employer. Here, Mr. Ligon did not act in any inappropriate manner. He simply informed Mr. Davies of a change in access rules via written correspondence. Mr. Davies chose to start a confrontation with Mr. Ligon by stalking him throughout the plant and then calling him an "ass." Mr. Davies had other, more appropriate ways to challenge Mr. Ligon's decision. The ALJ's reliance on a case that is clearly inapplicable underscores the lack of careful analysis that characterizes the decision.

case law emphasizes, because the norms of acceptable workplace conduct have evolved in the 21st century. Harassing, threatening and hostile conduct is unlawful under federal and state employment discrimination laws and federal labor laws should not set a lower standard. Accordingly, the ALJ erred in concluding that J&J violated Section 8(a)(1) and 8(a)(5) by banning Union Representative Richard Davies from the Facility, failing to recognize Mr. Davies as the Union's representative and telling J&J employees that Mr. Davies was not allowed on the premises.

B. The ALJ Erred in Determining That J&J Violated Section 8(a)(1) And 8(a)(5) of the Act by Ceasing Its Practice of Providing Cooked Quality Assurance ("Q&A") Food Samples in The Cafeteria Without Bargaining.

The ALJ erred in determining that J&J violated its bargaining obligation by unilaterally suspending the provision of QA samples because 1) the suspension did not result in a material, substantial and significant change to working conditions, 2) no enforceable unbroken past practice existed; and 3) the change was necessitated by law. First, the ALJ provided zero evidentiary support for her assertion that "**[i]n this context**, the great weight of authority establishes that the Respondent implemented a material, significant and substantial change without notice to the Union or an opportunity to bargain." The ALJ's did not cite to or rely on a single case involving the same context, i.e. irregular provision of QA samples, but rather cited a series of cases that involved the regular provision of employee meals, i.e. lunch, breakfast; the provision of food to all employees during all working hours, i.e. coffee and doughnuts on paydays; or the provision of annual Christmas gifts, i.e. a turkey. See ALJ Decision, pg. 24:16-30. These cases are inapposite to the irregular provision of quality assurance samples to a random segment of the workforce. The QA samples were not compensation, meal provisions, a holiday gift, or even provided to **all** employees.

Underscoring the uniqueness of the QA samples, the undisputed evidence presented at the hearing proved that QA samples were only provided when the QA sample lab was operating, usually twice a week at irregular intervals. (Tr. at 292:7-10). Roughly 24-32 samples would be provided at a time (for a plant that employs 165 individuals) and the samples were no larger than a small hot pocket. (Tr. at 401:3-4).[6] The samples were not provided to the employees on a daily basis. There was no credible testimony that the employees relied on these samples in any way as a consistent source of food or as an employer provided meal option. In fact, as the QA lab did not run during all shifts, many employees never had the opportunity to enjoy QA samples. At most, the QA samples, like the coffee in Weather TEC Corp, were a *de minimus* provision to employees who happened to be at the facility at the right time and one that the employer was free to change or suspend at its discretion.

Moreover, the ALJ's attempt to distinguish Weather Tec Corp., 238 NLRB 1535 (1978), a case relied on by J&J, on the grounds that bargaining occurred near the time of the unilateral change is unavailing. Just as in Weather Tec Corp., after the provision of QA samples was unilateral discontinued in early 2012, the parties engaged in collective bargaining and the Union never brought up the subject of the employer's unilateral discontinuance of the provision of QA samples. Accordingly, just like the decision to suspend providing coffee in Weather Tec Corp., the provision of QA samples was not a material, substantial and significant change and the ALJ erred in finding a violation of 8(a)(1) and 8(a)(5).

[6] McGuire's testimony that multiple products were provided by the QA lab as samples and that samples were provided on a daily basis is unsupported by any record evidence and is false. Every employer witness rebutted Mr. McGuire's testimony and made clear that only line two handheld product was provided by the QA lab as a sample and the samples were provided no more than two times a week at irregular intervals. Mr. Humble credibly testified that only line two handheld product was provided as a sample and that employees were not allowed to take food home after 2012. (Tr. at 447:7-21; Tr. at 450:1-4).

Second, contrary to the ALJ's finding, there is no unbroken practice of providing QA samples that would necessitate bargaining over the decision to suspend them. The ALJ's unsupported and un-cited assertion that J&J "takes too rigid a view of past practice" is flat wrong and constitutes reversible error. ALJ Decision, pg. 25:27-29. The ALJ completely failed to address J&J's argument that the Union's failure to contest the employer's last unilateral discontinuance broke any past practice and constituted a recognition that provision of QA samples was within J&J's discretion. In fact, a case that the ALJ relies on, Phila. Coca-Cola Bottling Co., 340 NLRB 349 (2003), supports J&J's position by finding no past practice existed where the practice at issue, award of employee bonuses, was irregular and broken. Id. at 353-354.

The undisputed record evidence is that in the winter and early spring of 2012, the management of the Weston Facility unilaterally suspended the provision of QA samples, along with several other practices related to food consumption and food removal from the Weston Facility, because of a concern that employees were removing product from the plant. The employer did not provide the union with notice or bargain over its decision to suspend QA samples. (Tr. at 136:19-23). The Union did not contest or grieve that decision.[7] (Tr. at 131:20-22; 450:13-16). More importantly, at the subsequent round of bargaining, the Union never broached the subject of QA samples or asserted that J&J lacked the authority to unilaterally stop the practice. The Union's conduct during the first suspension of QA samples underscores that the Union did not believe then, and does not believe in good faith now, that the employer has an obligation to bargain over the suspension of QA samples and evidences that there is no

[7] There is no dispute that ship steward McGuire was aware of the decision as he admitted he attended the meeting during which the change was announced and that he was fully aware of the unilateral change. He also stated that another employee told him he was going to file a grievance regarding the decision. (Tr. at 56:1-3). No grievance was ever filed.

consistent unbroken practice of providing them. The ALJ's unsupported assertion that J&J "takes too rigid a view of past practice" is flat wrong and constitutes reversible error.

In fact, it is the Union that is acting inconsistently by challenging the J&J's right to suspend QA samples. In 2012, the employer not only suspended QA samples, but also took the more dramatic step of preventing employees from taking home any product. Prohibiting the removal of product to take home is certainly more egregious and more impactful to the employees than simply suspending the samples; yet the Union did nothing. The Union's failure to act then demonstrates that the Union knew the employer had the right to stop the QA sample practice, and the Union's position today is merely a disingenuous attempt to compensate for the Union's failure in 2012.

Third, the decision to suspend the QA samples was motivated by a concern for protecting the Weston Facility's USDA license. It is in direct violation of USDA regulations for QA samples and other product not designated for sale to be sold outside the facility. J&J was concerned that if the allegations made by Mr. Davies were true- that employees were selling QA samples and other product outside the facility- the Weston Facility could lose its USDA license. It is axiomatic that an employer is not required to bargain over changes that are required or necessitated by law and the ALJ's conclusion to the contrary is incorrect and reversible. ALJ Decision, pg. 25:22-25; Murphy Oil USA, 286 NLRB No. 104, *8 (1987) (no violation of bargaining obligation where change is necessitated by law).

C. The ALJ Erred in Determining That J&J Violated Section 8(a)(1) And 8(a)(5) of The Act by Unilaterally Altering Plant Visitation And Access Rules to Conform The Rules to The Parties Collective Bargaining Agreement

The ALJ erred in determining that J&J violated its bargaining obligation by unilaterally altering plant visitation and access rules to conform to the Parties CBA because there was **zero**

evidence presented at the hearing or cited by the ALJ establishing that the changes affected the Union's ability to effectuate its representational duties in any meaningful way. The Board has consistently found that no bargaining obligation arises where a unilateral change to plant visitation or access rules does not impact a Union's ability to perform its representational duties. See Peerless Food Products, 236 NLRB 161 (1978) (employer did not violate its duty to bargain because the change in access rules was not material, substantial and significant because the change in no way diminished the employees' ability to access their union representative or limited the union representative's ability to perform his functions); Nynex Corp., 338 NLRB 659, 662 (2002) (employer's unilateral decision to cancel union representatives access card and require him to present identification to gain entrance into the plant was not a violation of the employer's bargaining obligation because, as a result of the change, the "Union was not denied access to any unit employees at the workplace."); National Sea Products, 260 NLRB 3 (1982) (employer's unilateral decision to restrict union representative from the production floor was not a material, substantial or significant change.).

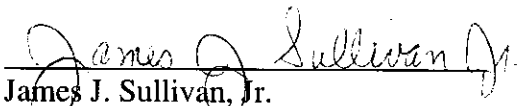
The ALJ's attempt to distinguish these cases by finding that the restrictions at issue are more extensive misses the mark. ALJ Decision, pg. 28:11-23. The dispositive inquiry is whether the restrictions would impact the Union's representational duties or deny employees access to their Union representative. Not a single employee testified that because of the new rules their access to their union representative had been damaged or lessened in anyway. To overcome this paucity of evidence, the ALJ relies on unmoored speculation that the changes would "inhibit the kind of candid exchanges possible between the represented employees and their union agents." ALJ Decision, pg. 28:7-8.

Illustrating the *de minimus* nature of these restrictions and the lack of foundation for the ALJ's decision, Mr. Davies admitted that he spent most of his time in the cafeteria. (Tr. at 77:12-13). It is incomprehensible that Mr. Davies's ability to represent his members would be limited by requiring him to remain in the area, the cafeteria, where he spends the preponderance of his time. Accordingly, the ALJ erred in concluding that J&J violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally implementing new plant access and visitation rules.

V. CONCLUSION

For the foregoing reasons, the ALJ's decision should be reversed and the National Labor Relations Board should issue an order finding that J&J did not violate Sections 8(a)(1) and 8(a)(5) of the Act with regard to the aforementioned conduct.

Respectfully submitted,



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